

No. 12,879

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES MONROE JEFFERSON,

Appellant,

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC., a corporation,

Appellee.

PETITION FOR REHEARING.

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*To the Honorable Judges of the United States Circuit
Court of Appeals, for the Ninth Circuit:*

Petitioner, STOCKHOLDERS PUBLISHING COMPANY, INC., a corporation, appellee herein, hereby respectfully petitions for a rehearing of the above entitled cause, wherein on the 18th day of January, 1952, this Honorable Court rendered its written opinion after submission of the cause on written briefs and after oral argument before the Honorable Clifton Mathews, Albert Lee Stephens and William E. Orr, Circuit Judges.

Grounds.

I.

THAT ACT 4317 OF DEERING'S GENERAL LAWS OF CALIFORNIA (REQUIRING PLAINTIFF TO FILE A BOND PRIOR TO THE ISSUANCE OF A SUMMONS IN ANY ACTION FOR LIBEL OR SLANDER) IS A SUBSTANTIVE LAW OF THE STATE OF CALIFORNIA AND IS NOT MERELY A PROCEDURAL LAW BUT ACCORDS TO A DEFENDANT IN CALIFORNIA CERTAIN SUBSTANTIVE RIGHTS IN ACTIONS OF SUCH CHARACTER.

II.

THAT UNDER THE DECISIONS OF THE UNITED STATES SUPREME COURT THE FEDERAL COURT MUST RECOGNIZE AND GIVE FULL EFFECT TO THE SUBSTANTIVE LAWS OF THE SEVERAL STATES, AND IN THE INSTANT CASE THE FEDERAL COURT, THEREFORE, IS REQUIRED FULLY TO RECOGNIZE THE PROVISIONS OF ACT 4317 OF DEERING'S GENERAL LAWS OF THE STATE OF CALIFORNIA.

III.

THAT THE "OUTCOME OF LITIGATION RULE" LAID DOWN BY THE UNITED STATES SUPREME COURT MUST BE APPLIED IN THE CASE AT BAR WHEREIN THE PARTIES ARE BEFORE THE FEDERAL COURT SOLELY BY REASON OF DIVERSITY OF CITIZENSHIP.

IV.

THAT THE FAILURE OF THE CLERK TO ISSUE SUMMONS FORTHWITH, AS REQUIRED BY RULE 4(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE, WAS OCCASIONED SOLELY BY THE FAILURE OF THE APPELLANT TO FILE WITH THE CLERK AT THE TIME APPELLANT FILED HIS COMPLAINT, A BOND AS REQUIRED BY THE SUBSTANTIVE LAW OF THE STATE OF CALIFORNIA.

ARGUMENT ON GROUND I.

That Act 4317 of Deering's General Laws of California (Requiring Plaintiff to File a Bond Prior to the Issuance of a Summons in Any Action for Libel or Slander) Is a Substantive Law of the State of California and Is Not Merely a Procedural Law but Accords to a Defendant in California Certain Substantive Rights in Actions of Such Character.

Act 4317, Section 1, provides:

“§1. Undertaking. In an action for libel or slander the clerk shall, before issuing the summons therein, require a written undertaking on the part of the plaintiff in the sum of five hundred (500) dollars, with at least two competent and sufficient sureties, specifying their occupations and residences, to the effect that if the action be dismissed or the defendant recover judgment, that they will pay such costs and charges as may be awarded against the plaintiff by judgment or in the progress of the action, or on an appeal, not exceeding the sum specified in the undertaking. An action brought without filing the undertaking required shall be dismissed.”

The Act clearly establishes substantive law which accords to a defendant in a libel or slander action filed in California certain rights which assure the defendant that there will be funds available, in the event the defendant finally prevails in the litigation, with which to at least partially defray his costs and attorney's fees. That is to say: *He may not be summoned into court until the bond required by the California law is first deposited*

with the clerk of the court. However, in this Honorable Court's decision, the Court states as follows:

"This being an action for libel and no undertaking for the payment of costs having been filed with the complaint, the clerk appears to have assumed that compliance with Rule 4(a) was precluded by §1 of Act 4317 of Deering's General Laws of California. The assumption was incorrect. *Section 1 relates to State court actions, not to Federal court actions.*" (Emphasis supplied.)

We respectfully submit that Section I of Act 4317, *supra*, is a law according *substantive* rights to all defendants in libel or slander actions in the State of California *regardless of the forum in which the action may be commenced.*

As was stated in *Appellant's Opening Brief* (p. 3):

"The federal court has jurisdiction only because of diversity of citizenship, as the action is for libel under the law of California and that law governs as to the rights of the parties. *One of the rights accorded the defendant in a libel action is that a bond shall be furnished by plaintiff before summons can be issued by the clerk* (Act 4317 General Laws of California, p. 1532). Section 1 of that act is as follows: . . ." (Emphasis supplied.)

Thus, appellant himself concedes that the statute confers substantive rights upon a defendant and that a defendant is entitled to enjoy those rights in the United States District Court as well as in the state courts.

The distinctions between substantive and procedural laws are well established, both in text books and by Federal and State court decisions.

See *Black's Law Dictionary*, Third Edition, which gives the following definition:

“Substantive Law: That part of the law which the courts are established to administer as opposed to the rules according to which the substantive law itself is administered. That part of the law which creates, defines and regulates rights, as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion.”

See *Cohen Executrix v. Beneficial Industrial Loan Corp.*, 337 U. S. 541; 69 Supreme Court 1221, 93 L. Ed. 1528 (1948), wherein the distinctions between procedural and substantive law are pointed out and discussed and wherein a state statute (New Jersey) analogous to Act 4317 of Deering's General Laws of the State of California was held to be a statute conferring substantive rights as distinguished from mere procedure.

See also *Shell Oil Co. v. Superior Court*, 2 Cal. App. 2d 348 (1934) where the Court stated at page 355:

“The statute* requiring the filing of a bond for costs in a libel suit is to protect those who in good faith are exercising their Constitutional guaranty of free speech and freedom of the press against the too common practice of instituting libel and slander suits inspired by mere spite and ill will and without good faith.”

Thus, we respectfully submit, it is abundantly clear that Act 4317 is a substantive law and creates substantive rights.

*Act 4317 of Deering's General Laws of the State of California.

ARGUMENT ON GROUND II.

That Under the Decisions of the United States Supreme Court the Federal Court Must Recognize and Give Full Effect to the Substantive Laws of the Several States, and in the Instant Case the Federal Court, Therefore, Is Required Fully to Recognize the Provisions of Act 4317 of Deering's General Laws of the State of California.

The Rules of Decision Act (28 U. S. C. A., Sec. 1652) provides as follows:

“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply.”

Thus, Act 4317, Deering's General Laws of the State of California, being a substantive statute, must be followed in the Federal courts. Analogous statutes in other jurisdictions have been held by the United States Supreme Court to be applicable and binding upon the Federal courts.

See *Cohen Executrix v. Beneficial Industrial Loan Corp.*, *supra*, wherein a State statute accorded corporations the right to require from a plaintiff security for reasonable expenses in any derivative action by a stockholder against the corporation, and wherein the Court stated at 337 U. S. at pages 555 and 556:

“Even if we were to agree that the New Jersey statute is procedural, it would not determine that it is not applicable. Rules which lawyers call procedural do not always exhaust their effect by regu-

lating procedure. But this statute is not merely a regulation of procedure. With it or without it the main action takes the same course. However, *it creates a new liability* where none existed before, for it makes a stockholder who institutes a derivative action liable for the expense to which he puts the corporation and other defendants, if he does not make good his claims. Such liability is not usual and it goes beyond payment of what we know as 'costs.' If all the Act did was to create this liability, it would clearly be substantive. *But this new liability would be without meaning and value in many cases if it resulted in nothing but a judgment for expenses at or after the end of the case. Therefore, a procedure is prescribed by which the liability is insured by entitling the corporate defendant to a bond of indemnity before the outlay is incurred. We do not think a statute which so conditions the stockholder's action can be disregarded by the federal court as a mere procedural device."* (Emphasis supplied.)

The analogy here is clear. Act 4317 creates a new liability where one did not previously exist. It prescribes a procedure by which the liability is insured prior to the time a defendant is required to expend money and entitles the defendant to a bond of indemnity prior to the time that he may be summoned into a court. These are substantive rights and are rights, we respectfully submit, which a defendant has in California whether he be before a State court or the United States District Court.

ARGUMENT ON GROUND III.

That the “Outcome of Litigation Rule” Laid Down by the United States Supreme Court Must Be Applied in the Case at Bar Wherein the Parties Are Before the Federal Court Solely by Reason of Diversity of Citizenship.

The case at bar is in the Federal courts solely by reason of diversity of citizenship. With reference to such class of cases the United States Supreme Court in the case of *Guarantee Trust Co. v. York*, 326 U. S. 99; 65 Supreme Court 1464; 89 L. Ed. 2079 (1944), stated as follows at 326 U. S. at pages 108 and 109:

“ . . . But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State. “ . . . The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.”

Thus, applying the “Outcome of Litigation Rule” to the instant case, in light of this Honorable Court’s decision, we are confronted with the following situation:

In the State court the plaintiff would be required to deposit a bond prior to issuance of summons and prior

to having the right to summon a defendant into court in a libel or slander action; but the same plaintiff, in the light of such decision*, could now, figuratively speaking, walk across the street and file his action with the clerk of the United States District Court and have summons issued and summon the defendant into court without the filing of any bond whatsoever.

The defendant would be required to appear and possibly at some stage of the proceedings the action would be dismissed or the defendant might prevail. In a State court the defendant could then look to plaintiff's bond. In the Federal court there would be no bond on file. This would result in the very evil pointed out in the *Cohen Executrix v. Beneficial Industrial Loan Corp.*, *supra*. Thus, this Court in determining that Section 1 (of Act 4317) relates to State court actions, not to Federal court actions has created a conflict in the basic law of the land as laid down by the famous case of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 Supreme Court 817, 82 L. Ed. 1188 (1937), and its progeny which have followed the *Erie R. Co.* case faithfully since that far-reaching decision was first announced. The progeny, of course, includes the *Cohen Executrix v. Beneficial Industrial Loan Corp.* (*supra*) case.

*See page 2 of decision: "Section 1 relates to State court actions, not to Federal court actions. In the Federal courts compliance with Rule 4(a) is required in all civil actions, including actions for libel."

ARGUMENT ON GROUND IV.

That the Failure of the Clerk to Issue Summons Forthwith, as Required by Rule 4(a) of the Federal Rules of Civil Procedure, Was Occasioned Solely by the Failure of the Appellant to File With the Clerk at the Time Appellant Filed His Complaint, a Bond as Required by the Substantive Law of the State of California.

We respectfully submit that when appellant chose the United States District Court as the forum in which to maintain his libel action, he was not only bound by the Rules of such court, but a duty developed upon him to furnish the clerk of the court with the bond required by Act 4317, *supra*, at the time he presented his complaint for filing to the end that the clerk would be enabled to comply with Rule 4(a) of the Federal Rules of Civil Procedure and issue the summons "forthwith." We further respectfully submit that it was appellant's failure to furnish the bond that prevented the clerk from complying with Rule 4(a), and that the fault is clearly attributable solely to appellant.

While it is probably true that the United States District Court at all times had *jurisdiction* over the parties, it will be noted that the trial court's Order of Dismissal was based on *two* grounds. The *first* (and thus presumably the more important) was the fact that appellant failed to comply with Rule 4(a) and the action was, therefore, ordered dismissed under the provisions of Rule 41(b) of the Federal Rules of Civil Procedure.

A failure of the trial court to dismiss the action upon appropriate motion in these circumstances would be tantamount, it is respectfully submitted, to holding that Rule 4(a) was a nullity. The refusal of the clerk to issue the summons "forthwith" was attributable, as heretofore pointed out, solely to the failure of appellant to comply with the substantive laws of the State of California, to wit, Act 4317 of Deering's General Laws.

Summary.

We respectfully submit:

1. That Act 4317 of Deering's General Laws of the State of California is a substantive law binding upon the Federal court and which it is required to recognize; and

2. That the failure to issue the summons in accordance with Rule 4(a) was occasioned solely by the fault of the appellant in not furnishing a bond at the time of the filing of his complaint which would have thus enabled the clerk to issue the summons in accordance with Rule 4(a); and

3. That the holding by this Honorable Court that "Section 1 (of Act 4317) relates to State court actions, not to Federal court actions" is not in accordance with United States Supreme Court decisions as applied to analogous statutes and does not follow the "Outcome of Litigation Rule." Further, such decision, if allowed to stand, would clearly deprive a defendant in the Federal court of certain substantive rights to which he is entitled in the State court.

For the reasons hereinabove stated, it is respectfully submitted that the within Petition for Rehearing should be granted.

Respectfully submitted,

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**Certificate of Counsel Under Rule 25
United States Court of Appeals.**

I hereby certify that in my opinion the grounds as stated in the foregoing Petition for Rehearing are well founded and said Petition is not interposed for the purpose of delay.

HOWARD M. BINFORD.